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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RENAN ROMAN HARO, Defendant and Appellant.	B261992 (Los Angeles County Super. Ct. No. SA084331)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathryn A. Solorzano, Judge. Affirmed.

Richard C. Neuhoff, under appointment of the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Renan Roman Haro of first degree murder (Pen. Code, § 187, subd. (a)[1]), and found that he personally discharged a firearm that caused death (§ 12022.53, subd. (d)). Haro admitted to a prior serious felony conviction that qualified as a strike (§§ 667, subds. (a)(1), (b)-(j), 1170.12, subd. (b)). The trial court sentenced him to prison for a term of 80 years to life.

On appeal, Haro claims that three statements the prosecutor made in closing argument constituted prejudicial misconduct and that his trial counsel rendered ineffective assistance in failing to object to the prosecutor's comments. Haro makes an additional claim of ineffective assistance of counsel based on his attorney's failure to request a limiting instruction on evidence of uncharged misbehavior by Haro that was introduced at trial. Haro's claims lack merit. Therefore, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Evidence at Trial*

On the night of June 7, 2013, Haro shot Terrance Nelson in the back of the head. Nelson died from his wounds. Christoph Meyer and Juan Ramos were present with Haro and Nelson at the time of the shooting. Police investigators interviewed Meyer and Ramos on June 8; they interviewed Ramos a second time on June 10. The interviews were recorded. At trial, Meyer and

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[1] Unless otherwise specified, all statutory references are to the Penal Code.

Ramos testified that they did not remember the details of the shooting, including who shot Nelson, and denied that they were afraid of Haro. During their interviews, however, Meyer and Ramos described the shooting in detail, identified Haro as the shooter, and stated that they were afraid of Haro.[2] Because their trial testimony diverged from the statements they made in their police interviews, the trial court determined that the jury should hear the recordings of the interviews and be provided a transcript of the recordings as well.[3]

1. *The Recorded Statements of Meyer and Ramos*

Meyer, Ramos, and Nelson were long-time neighbors and friends. On the night of June 7, 2013, they were in the garage of Meyer's home. Ramos and Nelson had been drinking since the morning and also had smoked marijuana.[4]

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[2] For example, both Meyer and Ramos said they did not identify Haro by name at first during their police interviews because they were "scared." Meyer told the detectives that he feared that Haro was going to kill him and his family.

[3] Haro did not testify at trial or offer any witnesses or evidence in his defense.

[4] Ramos had been celebrating his brother's graduation all day and was drunk when he first spoke with the police detectives on June 8, so they interviewed him again on June 10. One of the detectives who interviewed Meyer testified there was no indication Meyer was under the influence of drugs or alcohol; based on the detective's experience, Meyer was "just very upset" as "somebody that just witnessed their best friend getting shot in the head."

Shortly before 11:00 p.m., Haro walked into the garage. Haro lived nearby. He was the older brother of a friend of Meyer and Ramos's. Meyer and Ramos knew Haro. However, Haro did not know Nelson.

Meyer told the police detectives that, in the past, Haro "kind of intimidated" and "kind of like bullie[d]" him. Haro would "come over [to Meyer's house] and . . . just do whatever the fuck he want[ed]." Haro "kep[t] stuff" at Meyer's house, and told Meyer not to "move it." Meyer complied with Haro's demands because he had heard Haro was "crazy," and that Haro had a gun (although he had never seen Haro with a gun).

When Haro entered Meyer's garage on the night of June 7, he shook hands with everyone; however, he appeared "jittery" and was "saying weird shit." Meyer "figured he was on drugs." Nelson and Meyer were playing checkers at a table. Haro leaned on a jukebox, very close behind where Nelson was sitting. Then, "out of no[]where," there was a "boom." At first, Meyer thought that Haro had "lit a firework next to [Nelson's] head" because the group had been talking about fireworks. But then Meyer saw a hole in the back of Nelson's head with blood gushing out of it; at that point, it became "obvious" to Meyer that Haro had shot Nelson.

Meyer had not seen Haro holding a gun. But before Meyer heard the shot, he saw in his peripheral vision a black bag in Haro's hand. After the "boom," Haro dropped the bag and put both of his hands up. Meyer believed that Haro had a gun in the bag.

After the shot, Meyer was in "panic mode" and tried "to play it off like [he didn't] know what happened" because he was "so scared" Haro was going to kill him and Ramos as well. Meyer

said that Haro "tri[ed] to pretend like he had no idea what happened [and] act[e]d like he didn't know who shot [Nelson]" either. Meyer told the police, however, that he "knew exactly" that Haro "did it." Ramos likewise told the police that Haro shot Nelson. Ramos also stated that the shooting was not an accident and that Haro had not been arguing with Nelson before the shooting.

Immediately after the shooting, Meyer suggested that everyone leave the garage through the back door. But when Haro exited the garage first, Meyer and Ramos turned and ran through the open doorway from the garage into Meyer's house. After slamming and locking the door, Meyer called 911. The time of the call was 11:04 p.m. Meyer and Ramos waited inside Meyer's house for the police to arrive.

2. *The Police Apprehend Haro Near The Scene of the Shooting*

Shortly after the shooting, Haro was on a street near Meyer's house. Haro came upon a car occupied by Ify Anyanwu, who was in the driver's seat with the engine running. Anyanwu testified at trial that Haro appeared a "bit frantic." He pounded on the window of the car and said, "You got to help me, you got to help me. The cops are after me." Anyanwu told Haro to get away from the car. Haro tried to open the locked door. He reached his arm inside the driver side window and held on. Anyanwu started to drive away from where he had pulled over and sped up to about 30 or 40 miles per hour. Haro was still hanging on to the car. Anyanwu swerved in an attempt to throw Haro off of the car. Haro fell from the car. Anyanwu called 911 at 11:12 p.m. to report the incident.

Within a minute of Anyanwu's 911 call, police officers arrived in the area. Following a brief search, they found Haro hiding under a truck. He had blood on his clothing.

3. *The Investigation of the Shooting*

The police officers who responded to Meyer's 911 call searched Meyer's garage. There, they found a discharged nine-millimeter cartridge casing. In the alleyway outside the garage, officers located a black plastic bag with a hole in it; the size of the hole and lead testing results were consistent with the discharge of a firearm through the bag. Samples of blood on the bag and a red stain on Haro's jeans matched Nelson's DNA profile.

The medical examiner testified that the entrance wound on the back of Nelson's head had a "starburst pattern" and was a "classic . . . tight contact gunshot wound," meaning the muzzle was "right up against [Nelson's] skin." The medical examiner also testified that a plastic bag covering the gun would offer "no resistance," and thus "the bullet . . . would go right through it" and into the victim's brain.

B. *The Verdict and Sentence*

In the People's opening statement and closing argument, the prosecutor asked the jury to find that Haro killed Nelson intentionally and with premeditation and deliberation and thus convict him of first degree murder. In her opening statement and closing argument, Haro's counsel asserted that the evidence did not establish beyond a reasonable doubt that Haro committed first degree murder; instead, the evidence showed that there was a reasonable possibility that the killing was unintentional, or, if

it was intentional, that it was done rashly and impulsively, without premeditation and deliberation.

The jury found Haro guilty of first degree murder and found true a firearm allegation under section 12022.53, subdivision (d). After waiving his right to a jury trial on allegations that he had suffered a prior serious felony conviction that qualified as a strike, Haro admitted that he was convicted in 2007 for carjacking (§ 215, subd. (a)); the trial court found true the strike and prior serious felony allegations. The court sentenced Haro to state prison for a term of 80 years to life, which was broken down as follows: 25 years to life for the murder count, doubled to 50 years to life because of his prior strike (§§ 667, subds. (b)-(j), 1170.12, subd. (b)), plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)) and an additional five years for his prior serious felony conviction (§ 667, subd. (a)(1)).

Haro timely appealed.

CONTENTIONS

Haro contends that his first degree murder conviction should be overturned on the grounds of prosecutorial misconduct and ineffective assistance of counsel. His claim of prosecutorial misconduct is based on three statements that the prosecutor made in closing argument.

First, the prosecutor equated premeditation and deliberation to every day decisions, such as whether or not to enter an intersection at a stop sign. According to Haro, this statement misstated the law on premeditation and deliberation.

Second, even though the People did not allege that Haro had any gang connection, the prosecutor mistakenly referred to gang enhancement allegations against Haro and asked the jury to find those allegations to be true. According to Haro, this statement may have offered the jury a motive for Haro's killing of Nelson—namely, that Haro was a gang member who committed a random act of violence, as is the wont of gang members.

Third, the prosecutor told the jury to consider first degree murder before considering the possibility of lesser forms of homicide. According to Haro, this misstated the law, which allows the jury to consider lesser offenses at any point in their deliberations.

Haro's claim of ineffective assistance of counsel is based on his trial attorney's failure to object to any of the three challenged statements of the prosecutor, as well as the attorney's failure to request a limiting instruction regarding the evidence of Haro's bullying of Meyer that was presented at trial.

DISCUSSION

A. *The Challenged Statements of the Prosecutor During Closing Argument Did Not Constitute Prejudicial Misconduct*

1. *Governing Law*

"'"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible

methods to attempt to persuade either the trial court or the jury.'" [Citation.]" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1331-1332.) Bad faith on the prosecutor's part is not a prerequisite to finding prosecutorial misconduct under state law. (*People v. Hill* (1998) 17 Cal.4th 800, 821; accord, *People v. Lloyd* (2015) 236 Cal.App.4th 49, 61.) As our Supreme Court has explained, "'[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.' [Citation.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667; accord, *Lloyd*, at p. 61.)

Advocates have "significant leeway in discussing the legal and factual merits of a case during argument[,]" but "'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements [citation].' [Citations.]" (*People v. Centeno*, *supra*, 60 Cal.4th at p. 666.) A defendant challenging a prosecutor's remarks to the jury must show that, "'[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citaiton.]' [Citation.]" (*Id*. at p. 667; accord, *People v. Gamache* (2010) 48 Cal.4th 347, 371.)

Prosecutorial misconduct of federal constitutional dimension requires the reversal of a defendant's conviction unless a reviewing court finds the misconduct harmless beyond a

reasonable doubt. (*People v. Cook* (2006) 39 Cal.4th 566, 608.) Prosecutorial misconduct under state law requires reversal when a reviewing court finds that it is reasonably probable the result of a defendant's trial would have been more favorable absent the misconduct. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071; accord, *People v. Lloyd*, *supra*, 236 Cal.App.4th at pp. 60-61.)

"'"To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument.'" [Citation.]" (*People v. Charles* (2015) 61 Cal.4th 308, 327; accord, *People v. Williams* (2013) 58 Cal.4th 197, 274.) "'The reason for this rule, of course, is that "the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the jury."' [Citation.]" (*People v. Seumanu, supra*, 61 Cal.4th at p. 1341; accord, *People v. Peoples* (2016) 62 Cal.4th 718, 801.) "[F]ailure to request the jury be admonished does not forfeit the issue for appeal" if "a timely objection and/or a request for admonition . . . would be futile" or '"'an admonition would not have cured the harm caused by the misconduct.'"' (*People v. Hill*, *supra*, 17 Cal.4th at p. 820; accord, *Seumanu*, at pp. 1328-1329.)

Haro's trial counsel did not object to any of the prosecutor's statements in the closing argument that Haro contends constitute prosecutorial misconduct. Haro argues we nevertheless have authority to consider these challenges because his claim of prosecutorial misconduct "involves questions of constitutional law based on the undisputed facts set forth in the record," and because we have discretion in all cases to consider

any kind of claim, even when not raised below. Having considered Haro's claim of prosecutorial misconduct, we hold that none of the challenged statements constitutes misconduct.[5]

2. *The Prosecutor's Alleged Misstatement of the Law on Premeditation and Deliberation*

"Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) "'Murder that is premeditated and deliberated is murder of the first degree.' [Citation.]" (*People v. Pearson* (2013) 56 Cal.4th 393, 443.) """[P]remeditation' means thought over in advance,'" and ""[d]eliberation' refers to careful weighing of considerations in forming a course of action . . . ." [Citations.] 'An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.' [Citation.]" (*Ibid.*) """Premeditation and deliberation can occur in a brief interval. 'The test is not time, but reflection. "Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly."'" [Citation.]' [Citations.]" (*People v. Solomon* (2010) 49 Cal.4th 792, 812.) "[A] killing resulting from preexisting reflection, of any duration, is readily distinguishable from a killing based on unconsidered or rash impulse." (*Id.* at p. 813.)

In closing argument, the prosecutor asserted that Haro was guilty of first degree murder because he intentionally killed Nelson, and premeditated and deliberated over killing Nelson

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[5] Because we find no misconduct by the prosecutor, we do not reach Haro's claim that his counsel rendered ineffective assistance in failing to object to the prosecutor's statements.

before doing so. In explaining the meaning of premeditation and deliberation, the prosecutor said the following: "I'm going to give you an example [of] what you do every day which qualifies as deliberation and premeditation. You pull up to a stop sign in your car. We do this every day. You're making a decision at that point. That's all it takes. You look left, you look right, you decide if it's safe to go. And then you go forward. So what went through your mind in that few seconds? You deliberated, you premeditated. Is it safe to enter that intersection? You thought about it, you made the decision, you went forward. That's all it takes. The jury instructions will tell you that the length of time spent considering whether to kill does not alone determine a killing is deliberate and premeditated. This defendant could have sat at home for five days before and planned what he was going to do that day. Or could have happened [sic] while he was in the garage. It could have happened in the seconds before he pulled that gun up and put it to [Nelson's] head. A decision to kill me [*sic*, made] rationally [*sic*, rashly], impulsively, or without careful consideration is not deliberate, premeditated. But, on the other hand, again, a jury instruction, a cold, calculated decision to kill can be reached quickly. So, again, there is no time that's set in stone that has to be set deliberate [*sic*] by the defendant. It can be reached very quickly. Did he know what he was doing? Did he plan to do it? Yes. And why?"

Haro claims that the prosecutor's example misstated the law on premeditation and deliberation and "denigrated the constitutional requirement" of proving those elements beyond a reasonable doubt by equating Haro's "mental process . . . to the one jurors use when stopping at a stop sign." To support this proposition, Haro relies on *People v. Nguyen* (1995) 40

Cal.App.4th 28, 36. In that case, the Court of Appeal strongly disapproved a prosecutor's argument "that people apply a reasonable doubt standard 'every day' and that it is the same standard people customarily use in deciding whether to change lanes." (*Ibid.*) That analogy, the court said, "trivializes the reasonable doubt standard." (*Ibid.*) Drawing parallels between the example of deciding to proceed at a stop sign in this case and the example of deciding to change lanes in *Nguyen*, Haro asserts that "[i]f it violates the Constitution to argue that the reasonable doubt standard in general is satisfied by such a state of mind, then it necessarily follows that it violates the Constitution to argue that any individual element that has [to] be proven beyond a reasonable doubt can be satisfied by such a showing."

We disagree. There is a significant difference between providing examples of decisionmaking from everyday life to explain the meaning of premeditation and deliberation and using such examples to explain proof beyond a reasonable doubt. Proof beyond a reasonable doubt is a relatively fixed concept. It requires "an abiding conviction, to a moral certainty." (*People v. Nguyen, supra,* 40 Cal.App.4th at p. 36.) The concepts of premeditation and deliberation are much looser and more variable, particularly with respect to the period of time required for premeditation and deliberation. Indeed, as the trial court correctly instructed the jury, "The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other

hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of reflection, not the length of time."

To be sure, no matter the issue, "[c]ounsel trying to clarify the jury's task by relating it to a more common experience must not imply that the task is less rigorous than the law requires." (*People v. Centeno, supra,* 60 Cal.4th at p. 671 [prosecutor's attempt to explain the reasonable doubt standard "risked misleading the jury by oversimplifying and trivializing the deliberative process"].) Here, the prosecutor's stop sign example treads somewhat close to prohibited territory because the jury arguably might have perceived it as suggesting that deliberation does not require the careful weighing of the choice whether to kill a person.

We do not believe, however, that the example crossed over that line. Immediately after providing the example, the prosecutor tied Haro's thought process to the court's instruction on premeditation and deliberation, which was firmly grounded in the law. Referring to that instruction, the prosecutor said, "the length of time spent considering whether to kill does not alone determine [if] a killing is deliberate and premeditated," and that "there is no time that's set in stone" for an action to be premeditated and deliberate. The prosecutor then went on to argue the evidence established Haro acted with premeditation and deliberation because he entered the garage with a loaded gun he had concealed in a black bag—with a bullet in the chamber and the safety off—so when he put it to Nelson's head it was "racked and ready to go"; these facts, the prosecutor argued, meant Haro had "plan[ned] to do it," he "kn[e]w what he was doing," and he "executed" his plan. Viewed in the context of the evidence in the case and the entirety of the prosecutor's closing

argument, the use of the stop sign example was consistent with the law on premeditation and deliberation.

Even if the stop sign example trivialized concepts of premeditation and deliberation, the trial court cushioned that effect through its proper instructions on both. The court instructed the jury pursuant to CALCRIM No. 200, stating, "You must follow the law as I explain it to you . . . . If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." We are required to presume the jury followed all of the court's instructions, including the instruction that the jury must be guided by what the court said, not what counsel said. (*People v. Seumanu, supra,* 61 Cal.4th at p. 1336 ["absent some indication to the contrary, we assume a jury will abide by a trial court's admonitions and instructions"].)

Nguyen, Haro's lead case, undermines his claim of prejudice from the stop sign example. Although (as noted above) the court in *Nguyen* found that the prosecutor erred in using the lane changing example to explain the concept of reasonable doubt, the court concluded that the defendant was not prejudiced because the prosecutor also directed the jury to read the reasonable doubt instruction and the court correctly instructed the jury on that standard. (*People v. Nguyen, supra*, 40 Cal.App.4th at pp. 36-37.) Here too, the court's instruction on premeditation and deliberation and its further instruction that the jury follow its explanation of the law, not the attorneys' explanations, alleviated any prejudice from the prosecutor's stop sign example.

3. *The Prosecutor's Reference to "Gang Enhancements"*

At the conclusion of her rebuttal, the prosecutor told jurors that upon finding Haro guilty of first degree murder, "You're done. That's it. Including the gang enhancements, but you're done." The prosecutor plainly misspoke. No gang enhancements were alleged and no gang-related evidence was introduced. Haro contends the prosecutor's reference to gang enhancements constituted prejudicial misconduct that violated his due process rights to a fair trial. Haro is incorrect. The prosecutor's reference to gang enhancements, while certainly mistaken, was not misconduct. And even if it were misconduct, the reference did not prejudice the outcome at trial.

Haro relies on *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*), to support his claim of prejudice arising from the prosecutor's reference to gang enhancements. In *Albarran*, we observed that "California courts have long recognized the potentially prejudicial effect of gang membership" because the word ""gang"" has such sinister connotations. (*Id*. at p. 223.) "Given its highly inflammatory impact, the California Supreme Court has condemned the introduction of [gang] evidence if it is only *tangentially* relevant to the charged offenses. [Citation.] In fact, in cases not involving gang enhancements, the Supreme Court has held evidence of gang membership should not be admitted if its probative value is minimal. [Citation.] . . . [Citation.] [¶] Thus, as [a] general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative." (*Ibid*.)

Applying these principles, we found prejudicial error in *Albarran* arising from the admission of irrelevant gang-related evidence and thus reversed the trial court's denial of the defendant's motion for new trial. We noted that it is "rare and unusual" for a court to conclude that "the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair." (*Albarran*, *supra*, 149 Cal.App.4th at p. 232.) But we determined that to be the case in *Albarran* because of "the nature and amount of th[e] gang evidence [that was introduced], the number of witnesses who testified to [the defendant's] gang affiliations and the role the gang evidence played in the prosecutor's argument . . . ." (*Ibid.*)

Albarran bears no resemblance to this case. In *Albarran*, gang-related evidence was front and center at trial. By contrast here, as indicated above, the People did not allege any gang enhancements and introduced no evidence at trial that Haro had any association with a gang. In fact, the prosecutor scrupulously avoided any mention of Haro's possible gang affiliation throughout the trial, even though Meyer raised that issue in a portion of his police interview that was not provided to the jury.[6]

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[6] Before jury selection, the trial court discussed the issue of Haro's prior gang membership with counsel. Defense counsel noted there was "some evidence" of Haro's gang involvement, but the prosecutor stated that she did not intend to raise this issue because "this isn't a gang case, he's not in a gang anymore. The prosecutor further stated that Meyer knew about Haro's gang involvement, but the killing of Nelson "had nothing to do with that." Additionally, the prosecutor directed the People's witnesses not to mention anything about gangs, and before the jury heard Meyer's statements to police, she redacted any references he made to gangs. The court confirmed on the record

All indications are that the prosecutor probably meant to say "gun enhancement," not "gang enhancement," at the end of her rebuttal, because the case involved firearm allegations to which the court referred in its instruction and the prosecutor referred in her closing argument. In other words, the reference to "gang enhancement" seems to have been inadvertent.

It is true that bad faith or a culpable state of mind is not required for prosecutorial misconduct. An innocent error can qualify. (*People v. Centeno*, *supra*, 60 Cal.4th at pp. 666-667; *People v. Hill*, *supra*, 17 Cal.4th at p. 821; *People v. Lloyd*, *supra*, 236 Cal.App.4th at p. 61.) Nevertheless, we do not believe that the prosecutor's solitary, fleeting reference to "gang enhancements" at the end of her rebuttal, after she had steered clear of the word "gang" throughout the trial, constitutes prosecutorial misconduct. And even if the reference were misconduct, we do not perceive any prejudice arising from it. On this record, the strong likelihood is that the jury understood that the prosecutor to mean "gun," not "gang," given the absence of any gang evidence or any mention of gangs and the court's instruction on the firearm enhancement. We ""'do not lightly infer'"" the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements; the defendant must show a reasonable likelihood the jury understood the comments in an improper manner "'[i]n the context of the whole argument and the instructions.'" (*People v. Centeno*, *supra*, 60 Cal.4th at p. 667.) Haro has failed to make that showing.

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that the prosecutor redacted references to gang affiliation "on her own. She wasn't ordered to do it," and "it wasn't based on a decision by the court."

4. *The Prosecutor's Statement Regarding the Jury Deliberation Process*

People v. Kurtzman (1988) 46 Cal.3d 322 (*Kurtzman*) established the principle "'that the jury may deliberate on the greater and lesser included offenses in whatever order it chooses, but that it must acquit the defendant of the greater offense before returning a verdict on the lesser offense.' [Citation.]" (*People v. Clark* (2016) 63 Cal.4th 522, 608; *People v. Dennis* (1998) 17 Cal.4th 468, 536 [under *Kurtzman*, "a trial court should not tell the jury it must first unanimously acquit the defendant of the greater offense before deliberating on or even considering a lesser offense"].)

Haro contends the prosecutor violated the *Kurtzman* principle by stating in her rebuttal that the jury had to consider first degree murder at the outset, before turning to the lesser offenses. In making this contention, Haro refers to the following passage from the prosecutor's rebuttal: "When you go back and approach your task, then, for murder—I know we got kind of confused. It gets confusing, all the jury verdict forms. What you're going to get first or what you should do first is, according to the instructions, you're going to get first degree murder first. You as jurors are going to go back, talk about first degree murder, talk about willful, deliberate, premeditation [*sic*] murder. If you cannot all 12 agree on if it's a first degree murder, that's when you let the judge know. We'll give you further instructions. If you all go back there and say one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve—you deliberate, you talk, and you all say, 'This is premeditated, deliberate, intentional murder.' He did it, 'we agree.' You fill out 'guilty,' you're done. You're done. That's it. Including the gang

[*sic*, gun (as discussed in the preceding section)] enhancements, but you're done. If you all go back there and say, 'all 12 of us think it's not first degree murder,' then you write 'not guilty' on first degree murder, and now you move to second. And that will—'that's how we'll go.' Then you're talking about second degree murder. Now you're saying, 'All right. Now we're on second. Do we all agree it's a murder? Do we all agree it's a murder?' That's how you approach your task."

While his brief quotes the entire passage, Haro's *Kurtzman* complaint is premised on the prosecutor's statement in the passage that, "What you're going to get first or what you should do first is, according to the instructions, you're going to get first degree murder first." We do not read this statement as a directive to the jury that it had to deliberate on first degree murder before deliberating on the lesser offenses, in contravention of *Kurtzman*. The prosecutor said that what the jury would get to first would be "according to the instructions." And, according to the instructions, the court told the jury, per *Kurtzman*, it could consider the offenses in any order it wished, but that it could not reach a verdict of not guilty or guilty of second degree until it decided the defendant was not guilty of first degree murder.[7] In light of the cross-reference to the

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[7] Specifically, the court instructed as follows: "You will be given verdict forms for guilty and not guilty of first degree murder, second degree murder and involuntary manslaughter. You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty or not guilty of second degree murder only if all of you have found the defendant not guilty of first degree murder. And I can accept a verdict of guilty or not guilty of involuntary manslaughter only if all of you

instructions, we construe the prosecutor's statement as reminder regarding what the jury had to decide first, not what it had to consider first. In any event, we do not believe it likely that the jury interpreted the prosecutor's statement in an anti-*Kurtzman* fashion, for elsewhere in the passage in question, the prosecutor referred to "mov[ing] to second [degree murder];" and in accordance with the court's *Kurtzman*-based instruction, that reference likely would be understood as meaning that the jury could move to deciding second degree only after deciding that Haro was not guilty of first degree murder. In sum, even if the prosecutor's statement was inartful and confusing, we discern no prejudice from it.

Our conclusion that Haro was not prejudiced is reinforced by the Supreme Court's admonition, dating back to *Kurtzman* itself, that even when *Kurtzman* error is based on improper instruction by the trial court, there is an "inherent difficulty" in demonstrating prejudice from such error. (*People v. Fields* (1996) 13 Cal.4th 289, 309, fn. 7; *Kurtzman, supra,* 46 Cal.3d at pp. 324-325 [trial court erred in telling the jury "it must unanimously agree on whether [the] defendant was guilty of second degree murder before 'considering' voluntary manslaughter," but these remarks did not prejudicially affect the verdict].) Prejudice arising from *Kurtzman* error is hard to show because, "in the abstract," an erroneous instruction that a jury must acquit on first degree murder before turning to lesser charges "appears capable of either helping or harming either the People or the defendant. In any given case, however, it will likely be a matter

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have found the defendant not guilty of both first and second degree murder."

of pure conjecture whether the instruction had any effect, whom it affected, and what the effect was." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1078, fn. 7, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

B. *Haro's Counsel Did Not Render Ineffective Assistance in Failing To Request a Limiting Instruction Regarding the Evidence that Haro Bullied Meyer*

1. *Governing Law*

To prevail on a claim of ineffective assistance of counsel, the defendant must show (1) his counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) his counsel's deficiencies resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [104 S. Ct. 2052, 80 L. Ed. 2d 674]; *People v. Ledesma* (2006) 39 Cal.4th 641, 746; *People v. Ledesma* (1987) 43 Cal.3d 171, 216, 218.) "'Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy."' [Citation.] When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was ""no conceivable tactical purpose"' for counsel's act or omission. [Citations.]' [Citation.] '[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one . . .[]' [citation], and 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence' [Citation]." (*People v. Centeno*, *supra,* 60 Cal.4th at pp. 674-675.)

Evidence Code section 1101, subdivision (a), states that, as a general rule, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion," but there are several statutory exceptions to this rule. Evidence Code section 1101, subdivision (b), sets forth exceptions to this rule. It states, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." Evidence Code section 1101, subdivision (b), thus allows "admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, fn. omitted.) Additionally, Evidence Code section 1101, subdivision (c), specifies, "Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

2. *Counsel's Failure To Seek a Limiting Instruction on The Bullying Evidence Neither Fell Below Professional Norms Nor Prejudiced Haro*

The People sought to introduce Meyer's statement in his police interview that Haro had bullied him in the past and Meyer's description to the police of the nature of that bullying behavior. Haro's counsel objected on the ground that this was "propensity evidence" that tended "to make [Haro] seem like a

crazy person who carries a weapon,[8] who bullies people and forces them to stash drugs." Counsel further argued the evidence was improper under Evidence Code section 1101, subdivision (b), and irrelevant because the jury had already heard Meyer was afraid Haro was going to shoot him "that night after believing that Mr. Haro shot his friend," and there was "no connection to past behavior as to why that influences Mr. Meyer's testimony."

The trial court ordered the prosecutor to redact any references to drugs but overruled Haro's objection, finding the statement that Haro had bullied Meyer was relevant "to [Meyer's] state of mind" toward Haro—that is, whether Meyer found Haro threatening and feared him. This ruling came just after Meyer had taken the stand and testified he did not fear Haro. (Evid. Code, §§ 780, subd. (f), 1101, subd. (c).) The court further observed that "bullying" is "not a crime" and it did not find "any . . . prejudice that outweighs the probative value." (Evid. Code, § 352.)

On appeal, Haro does not challenge the court's ruling admitting the bullying evidence. He claims, however, that his counsel rendered ineffective assistance in failing to request a limiting instruction, based on CALCRIM No. 375, advising the jury on how it should consider this evidence. Specifically, Haro argues that his counsel should have asked the court to instruct the jury that, "[t]he People presented evidence of other behavior by the defendant that was not charged in this case,'" the jury

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8 As discussed more fully in footnote 9, *post*, over defense counsel's objection, the trial court allowed the admission of Meyer's statement he had heard Haro had a gun, instructing the jury it could only be considered for a "limited use"—namely, Meyer's state of mind. Haro does not challenge these rulings.

could consider the evidence "for a specified purpose," but the jury could "'not conclude from this evidence that the defendant has a bad character or is disposed to commit [a] crime.'" According to Haro, his counsel's failure to request a limiting instruction on the bullying evidence is inexplicable in light of his counsel's nonobjection to a comparable limiting instruction under CALCRIM No. 303 that the trial court gave regarding Meyer's testimony that he heard Haro had a gun.[9]

Haro's claim of ineffective assistance is meritless. First, Haro has not demonstrated that his counsel's failure to request a limiting instruction on the bullying evidence fell below an objective standard of reasonableness under prevailing professional norms. The record suggests that counsel's inaction reflected an understandable tactical decision not to highlight the bullying evidence even further and possibly lend credibility to Meyer's testimony on the subject, thus damaging Haro's defense to the first degree murder charge. Counsel's nonobjection to the

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[9] In the limiting instruction regarding Meyer's statement that he heard Haro had a gun, the court told the jury this evidence could only be considered for a "limited use"—namely, as evidence of the speaker's (Meyer's) state of mind—but not as evidence Haro had ever had a gun on a prior occasion. "I'm informing you not to use this evidence for the truth of the matter because you don't know who said this" and "you don't know . . . the circumstances under which the statement was made." Later, in instructing the jury before closing arguments, the court told the jury: "During the trial, certain evidence was admitted for a limited purpose and I stated the limited purpose of the evidence. You may consider that evidence only for that purpose and for no other." (CALCRIM No. 303 [limited purpose evidence in general].)

limiting instruction on Meyer's testimony that he heard Haro had a gun also can be explained. Calling attention to the gun evidence through a limiting instruction would be less damaging to Haro's defense because Haro did not dispute at trial that he had a gun and brought it with him to Meyer's garage on the night of the shooting.

In any event, Haro has failed to show prejudice arising from counsel's failure to request a limiting instruction on the bullying evidence. The evidence the prosecution presented at trial was at odds with Haro's argument the shooting was either unintentional or, at most, rash, impulsive and without careful consideration. Meyer and Ramos unequivocally told police detectives that the shooting was "no accident." Meyer stated Haro did not look like he was *actually* surprised; he said Haro was imitating Meyer and Ramos—"trying to act like [them]." He was "just trying to like pretend [he] didn't know what the fuck was going on"—"just acting like," only "trying to pretend like he had no idea what happened." Meyer "kn[e]w exactly" what happened." Furthermore, the gun Haro used to kill Nelson was concealed in a black bag hidden from view until the moment he pressed it tightly against the base of Nelson's skull and pulled the trigger. All told, it is not reasonably probable that, but for his counsel's failure to request a limiting instruction on the bullying evidence, Haro would have been convicted of a lesser offense than first degree murder.[10]

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[10] Haro contends the asserted errors he has raised on appeal, when considered cumulatively, compel reversal. Because we have rejected all of Haro's claims of error, there are no errors to aggregate. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1382

DISPOSITION

The judgment is affirmed.

SMALL, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

[no cumulative error where court "rejected nearly all of [the] defendant's assignments of error"].)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.